IN THE

Supreme Court of the United States

October Term, 1971

No. ——

G. PETER HONCHOK and R. DOYLE GRABARCK, individually, and as President of THE NORTH AMERICAN HABITAT PRESERVATION SOCIETY, a citizens conservation organization, and in behalf of all others similarly situated,

Petitioners,

v.

CLIFFORD M. HARDIN, Secretary of Agriculture of the United States, a Maryland resident; AMERICAN SMELTING & REFINING COMPANY, a Delaware corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOURTH CIRCUIT

LEONARD J. KERPELMAN,
2403 Rogers Building
Baltimore, Maryland 21209
SA 7-8700

Attorney for Petitioners.

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A. REPORTS BELOW

The opinion of the United States District Court, Thomsen, J., is reported at 326 F. Supp. 988. That opinion is also appended hereto; the *Per Curiam* Opinion of the United

States Circuit Court of Appeals, Fourth Circuit, is reported at ___ F.2d ____, and is appended hereto also, immediately following Judge Thomsen's Opinion.

B. GROUNDS FOR INVOKING JURISDICTION OF THIS COURT (i) (iii)

The judgment of the United States Court of Appeals for the Fourth Circuit was rendered on December 2, 1971, and entered the same day. It was a two line *Per Curiam* Opinion. No re-hearing was requested, nor any Order granting an extension of time within which to file a petition for certiorari; jurisdiction of this Court is believed to be conferred pursuant to 28 U.S.C. 1257(3), there having been asserted below and claimed here, denials of rights, privileges, and immunities secured by the Fifth and Ninth Amendments to the Constitution of the United States. The United States Court of Appeals for the Fourth Circuit ruled upon these said matters of denial of rights, privileges and immunities unfavorably to the Petitioners.

C. THE QUESTIONS PRESENTED FOR REVIEW

Can a land law passed by Congress in 1872 for the purpose of enabling a "settler" to ". . . build (his) little home . . . raise his peach trees and potatoes and conduct his mining and farming operations . . . .", now be used without restraint for the stockholder profits of a huge corporation and as an instrumentality in raping the lands of a breathtakingly beautiful national forest?

1. Are public lands held in trust?

2. What are the terms of the trust?

3. Does constitutionally valid administration of the Mining Act of 1872 require that the Secretary of Agriculture take preliminary action to evaluate proposed destructive schemes before permitting their operation on public lands under his control?

4. Has the Mining Act of 1872, by virtue of the passage of time and disappearance of natural unspoiled areas of public land, become constitutionally invalid on its face under the Fifth and Ninth Amendments?

5. Does the Fifth Amendment prohibit a land-destructive scheme which will effectuate the collection of a billion dollars worth of molybdenum for the primary benefit of some private stockholders of a Delaware corporation at the expense of the despoilation of one of the most beautiful areas of Idaho?

6. Does the Ninth Amendment, reserving certain rights to the people prohibit the scheme?

7. Does not every trust, specifically a trust-held property interest of the United States, have limitations upon the wasting of the *corpus* of the trust, so that where Congress has ostensibly granted statutory authority for such waste, it has enacted only a nugatory statute?

8. Did the Secretary of Agriculture erroneously fail to require a showing by the Defendant, American Smelting, that the mineral deposits sought were "valuable", as defined in Title 30, Section 29, and does not that Section necessarily define "valuable", by implication, as taking into account both the benefit to the public, and the detriment?

9. Did not the Secretary of Agriculture utterly and illegally fail to pass Regulations and enforce standards which would properly protect the public lands as the *corpus* of a trust?

10. Is not the proper interpretation of U.S. Constitution, Art. IV, Sec. 3, Cl. 2 ("Congress shall have power to dispose . . . ") merely a *conveyancing* device, to provide simply for authorization for *someone* to validly sign Deeds?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the following:

1. A portion of the Fifth Amendment to the Constitution of the United States:

> "No person shall . . .be deprived of life, liberty, or property, without due process of law; . . . ",

2. The Ninth Amendment to the Constitution of the United States:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny of disparage others retained by the People."

3. Article IV, Section 3, Cl. 2, of the Constitution of the United States:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ".

(The Plaintiffs contend that this is a mere conveyancing device; the Courts have invariably held it was far more – a complete dispositive power vested in Congress. The clause does not say *full* power.)

4. That portion of the Mining Act of 1872, which provides:

> "Except as otherwise provided, all valuable mineral deposits in lands belong to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such under regulations prescribed by law and according to local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

The statute is found at 30 U.S.C., Sec. 22 (1964).

E. STATEMENT OF THE CASE

In 1872, almost exactly one hundred years ago, Congress passed an Act, thereafter called the Mining Act of 1872, which, in the course of the debates, was characterized in purpose as follows:

> "Now, Sir, this legislation was originally an experiment . . . Some thought . . . the government . . ought to keep control of the precious metals, and hence it was not advisable for the mines to pass out of its own hands into the hands of its people. But it was argued that these people were to a great extent nomadic and unsettled, in one section this year and next year in some other place, and it was necessary to attach them to the soil so that they would make more permanent improvements and acquire for themselves lands which they could improve, upon which they *could build their little homes.* Where agricultural land was connected with

mining lands, and these are almost inextricably intermixed, the miner would make his improvements, cultivate his land, *raise his peach trees and potatoes, and conduct his mining and farming operations at the same time, or at different times of the year,* and the result would be a more settled community, and the creation of more taxable property to the benefit of both the States and General Governments." (Emph. Supp.) —The Congressional Globe, January 23, 1872, page 534.

Subsequently, Lo and Behold!, the nation did expand westward, the western territories were settled, prospectors did enter the public lands, some of them giving up their former wayward and nomadic form of life and establishing settled communities. Meanwhile, others in the same society were busy forming corporations, conglomerating, floating stock issues, expanding, buying up mining claims, and, in general, these others were becoming huge and powerful and politically influential corporations, which is by all means, not to say that they did not cause also, great economic benefit to society. But now, westward expansion of the nation has been concluded, and "interior" expansion also, which is to say that substantially all available exploitable lands have become taken up by private, frequently corporate, interests.

Meanwhile, also, and much more recently, people began to gaze about them and find that one could no longer see the clear and distant horizon for the smog; one could no longer expand one's chest to suck in the pure air of nature; one could no longer, in many instances, see a tree at all, since the billboards were notoriously ill-inclined to fall, being supported by strong economic buttresses; and suddenly one found Yellowstone Park paved wall to wall with trailers and

campers, nature trails paved with beer cans, people everywhere, nature shrinking and shrivelling in dismay, and e.e. cummings being led to exclaim, "... This world is all aleak/And life preservers there are none."

So that when American Smelting & Refining Company, with the blessing of the Secretary of Agriculture, both Defendants here, decided it was time to construct a huge open pit (strip) mine in the forefront of beautiful Castle Peak in the White Clouds Mountains in Idaho, in the Challis National Forest, the Plaintiffs were so aghast that they sued, claiming that the congressional enactment, with the passage of time, had become a taking up of property equitably owned by the Plaintiffs as *cestui que trust* in common with all other citizens of the United States, and that the taking was without Due Process of law, and without just compensation, in violation of the Fifth and Ninth Amendments; they also complained about the non-existent niceties (absence of Regulations) in the Secretary's administration of the Mining Act of 1872. The 1872 Mining Act, it should be said, purportedly gave everyone the right to prospect, perfect, and work any mining claim which turned up "valuable mineral deposits" *in the public lands.*

Plaintiffs are a citizen of West Virginia and a citizen of Maryland; the latter sues individually, and as President of The North American Habitat Preservation Society, a Pennsylvania corporation (also a Plaintiff). The corporation is alleged to be a conservation organization with over four thousand members, mostly young, who are interested in the preservation of a "viable habitat and environment", and who have and will participate in "all the valid uses of the national forest, including recreational, environment-preservation uses, and just looking and having." (Paragraph 3 of the Complaint.)

The Plaintiffs sue in their own behalf, and on behalf of all others similarly situated.

The Plaintiffs allege that the corporate Defendant was preparing to mine molybdenum in the Challis National Forest, and had applied to the Secretary for a "road permit", which the Secretary intended to grant.

The Plaintiffs sought (1) a Declaratory Judgment that the Mining Act of 1872 (Act of May 10, 1872, c. 152, 17 Stat. 91, 30 U.S.C.A. 21, ets. seq.) is unconstitutional; (2) an Injunction restraining the Secretary of Agriculture or American Smelting and Refining Company, Defendants, from implementing any mining or other claim validation provisions of said Act, because of "repugnance to the Constitution of the United States, and that the Secretary be restrained and enjoined from trespassing upon the Challis National Forest for the purpose of conducting mining operations or explorations"; (3) a Mandatory Injunction directing the Secretary "to exercise his ministerial duty which exists, of preventing destructive trespasses upon any national forest, and more particularly, upon the Challis National Forest, and to prevent the entry of persons whose intention is to mine or prospect thereon"; and (4) for such other and further relief as the nature of the case may require.

The complaint also alleged facts, such as the following, which, on the state of the pleadings, and for the purposes of the case, are assumed to be true, such as:

A. (See Complaint, Para. 5)

The Defendant company is engaged in the despoilation by prospecting of Challis National Forest lands; its plans include digging, scraping, dumping of hundreds of millions of tons of soil and rock, and tailings, road building, factory construction, ore smelting, all in the national forest.

B. (See Complaint, Para. 6.)

In 1872, there was a necessity which was in furtherance of the public welfare to develop these lands.

C. (See Complaint, Para. 7.)

Today, there are left in the United States, but few wilderness areas, virgin forests, undisturbed woodlands, wild lands, and forests of various sorts which have not as yet been "developed", and which, in fact, have become a rarity, while the population of the United States has increased from 41,972,000 in 1872, to 203,000,000 in 1970.

D. (See Complaint, Para. 8)

There is presently in the United States a one hundred year known reserve supply of the ore of molybdenum, which is the mineral sought by the Defendant company.

The court below, in its consideration of the case, in terms, stated that it considered the Plaintiffs to have relied on the Fifth and Ninth Amendments. (Order of June 9, 1971.)

G. FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction below was claimed under 28 U.S.C. 1331(a), 1332(a), and 1361, venue under 28 U.S.C. 1391(a), (b), (c), and (e). A Three Judge Court was requested under 28 U.S.C. 2282.

It was alleged that the Secretary of Agriculture resided in Maryland, and that the corporate Defendant, a Delaware corporation, with its principal office in New York, regularly carries on business in Maryland; the Secretary moved to dismiss for lack of jurisdiction and venue,for lack of standing, and on the merits. The corporate Defendant did not question jurisdiction or venue, but moved to dismiss for lack of standing, and lack of a substantial constitutional question. (See also the Court's Opinion (Thomsen, J.), pp. 1-3, for substantially a reiteration of the Statement of Facts by the Court).

ARGUMENT

In General

In a paper entitled "Myths Surrounding the Public Land Law Review Commission's Work", by Hon. John P. Saylor, M.C., Pennsylvania, which is attached hereto in the Appendix to the Plaintiff's Brief below, Representative Saylor had this to say:

> "The Constitution of the United States is nearly two hundred years old and it is still a sound, workable document. *The Mining Law is nearly one hundred years old and it is an abomination, an insult to the*

people of the United States . . . (Emphasis supplied)

> "Human Nature has not changed much since the Constitution was written, so there is little need to change that document. The technology and economics of the mineral industry today are unbelievably different from those prevailing when the Mining Law was adopted."

Gifford Pinchot on the Subject

Gifford Pinchot was the father of our national forests and parks.

In the foreward to a simple and homely children's book called "The Land We Live In", by Price (whom Pinchot characterizes as "for many years my right hand in the Forest Service"), Pinchot addresses the young people of his country, for whom he had established the marvelous inheritance which our public lands still, thankfully, largely constitute. It does this Court honor, Counsel is sure, to quote that same statement, directed by Pinchot to the nation's children:

> " . . . Most of our boys and girls already understand that this is their country just as much as it is the country of their fathers and mothers. But that is not the whole truth. For this country of ours belongs far more truly to the boys and girls than it does to us older people. They will live in it and enjoy it longer than we shall; and everthing that happens in it, every bit of waste, and every saving of waste, will effect their lives more than it does ours. *We are only the trustees, taking care of the country for them until they are ready to take care of it themselves.* And when that time comes, they will then become in their turn what we are now—trustees for those who are coming afterward." (Emphasis Supplied)

In 1911!

What a splendid statement, yet in the simplest of terms, of the basic and fundamental characteristic of this *trusteeship*—the statement that the trust ownership *excludes* consumption or expenditure of the trust property.

That is the fundamental question of this appeal. Does Congress have a *fee* interest in the public lands, or a trust interest? If a fee interest, the 1872 Mining Act is constitutional; if a trust interest, then it is respectfully suggested that the 1872 Mining Act, though constitutional in 1872, is clearly unconstitutional *now*, as applied to the wasting of lands in the Challis National Forest.

The Court is respectfully urged to note that the constitutional provision in question (Art. IV, Sec. 3, Cl. 2), while giving Congress power over United State's lands, *does not, in terms, give "FULL"* power.

These Lands Are Held in Trust

In 1947, Mr. Justice Black, speaking for the Court in the case of *United States v. California*, 332 U.S. 19, said:

> "The government which holds its interests here as elsewhere *in trust for all the people*, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescense, laches, or failure to act."

United States v. California was an offshore lands case. By its trust language, it implies a number of propositions which are of assistance to the Plaintiffs including:

1. The United States holds all interests in lands "in trust for all the people."

2. Ordinary rules and ordinary applications would seem to not apply to government lands which are held "in trust for all the people" but they are given a special, a privileged consideration.

It is the Plaintiff's theory that this consideration should govern in the present case, and that this consideration requires that the lands not be dissipated and frittered away for private purposes nor, in fact, for any purpose which is opposed to the interest of "all the people".

The Nature of This Trust

In *United States v. California, supra,* the Supreme Court stated that public lands are held in trust, without indicating anything about the nature of the trust.

However, once the *fact* of a trust is assumed, its nature is very well set out by Common Law.

> "A trust is a fiduciary relationship in which one person is the holder of the title to property, subject to an equitable obligation to keep or use the property for the benefit of another."
>
> Handbook of the Law of Trusts, *Bogert*, Sec. 1.
>
> "The trustee holds the property 'for the benefit of' the beneficiary . . . The duty of the trustee is enforceable by the beneficiary . . . Many definers of

the trust make enforceability in a court of chancery or equity a part of their definition."

Ibid.,

"'A trustee's powers . . .,are called 'implied' if they are not set forth in the trust instrument in so many words, but are deemed by equity to have been intended by the settlor because convenient or necessary to the accomplishment of his trust purposes."

Ibid., Sec. 88.

Any Trustee Has a Duty to Keep the Trust Property Safely.

"Having obtained possession of the trust property, it is the duty of the trustee to protect it. If there is trespass upon or waste of the trust property, he should bring the appropriate action . . . If real property of the trust is wrongfully occupied, he should eject the trespasser . . . "

Ibid., Sec. 99.

These *details* of the trust question have never been treated of by any Court. It is respectfully urged, most strongly urged, that the time has now come, when they *should* be.

Perhaps the Crucial Question

Perhaps the crucial question is whether grant of a power of sale to the trustee, the Congress, *gives blanket authority to sell whenever and wherever the trustee pleases.*

Certainly, the *cestui* has the right to raise the question.

> "The *cestui que trust* can raise the question of the power of the trustee to sell the trust property or the propriety of the sale as conducted."
>
> Bogert on Trusts, 3rd Ed., Chapter 15, p. 514.

> "A court of equity has *inherent* power to order or forbid a sale of trust property; notwithstanding any direction of the settlor.
>
> "The court of equity has inherent power to do whatever is necessary to insure that the trust purpose of the settlor, if lawful, is carried out."
>
> *Ibid.*, Chapter 15, page 515.
>
> See also Restatement, Trusts, Sec. 190.

Thus, although Congress has the power of sale, this Court has the distinct, in fact, *inherent* power to *oversee* that sale, to see that the purposes of the trust are carried out.

This question has never been determined by a Court.

This May Be a New Type of Trust in Which the Purposes Change With Time

Obviously, the land laws were instituted so that the citizens of the United States would get the best possible benefit and use out of those lands which Congress had power over.

At the time of passage of the law in question, the lands were being used to finance schools, to reimburse war veterans for services, to expand the economy.

Obviously, those purposes, appropriate then, are not nearly so appropriate now, as the saving of lands, their preservation intact and wild, and their protection.

It is respectfully suggested that this is a trust in which over the long period of time during which the trust subsists, it could change, did change, and will change further, and that the Court, as implied in *U.S. v. California,* should never allow the *corpus* to be used in ways which are inimical to the interests of the *cestui.*

Inherent power cases:

Amory v. Attorney General, 179 Mass. 69; *Rolfe and Rumford v. Lefebre,* 69 N.H. 238, 45 A.1087.

Also note: As part of the same general control over trusts which chancery has, it may forbid a sale, even though directed by the settlor. *Bogert,* Chapter 15, page 516, citing 101 Md. 686, *Bertron, et al v. Polke*:

> "The trustee has a duty to protect the trust property against injury or destruction. He is obligated to the *cestui* to do all acts necessary for the preservation of the trust *res* which would be performed by a reasonably prudent man employing his own like property for ends similar to those of the trust."

Ibid., Chapter 29, page 216.

"The court has power to restrain a trustee from exercising a power of sale which he has . . . . ."

Ibid., Chapter 35, page 587.

"Where a trustee has a power to sell realty, but threatens to use it in such a way as to injure the trust . . . by way of arbitrary or unreasonable action, he may be enjoined from selling on application of a beneficiary."

Sauvage v. Gallaway, 1947, 73 N.E.2d 133 (Illinois).

And see *City of Englewood v. Allyson*, 1957, 133 A.2d 680 (N.J.), in which a trust was established to "maintain and preserve the integral beauty of the palisades in Englewood Cliffs . . . ", and the Court by Order prohibited sale of the property which was to have been used to maintain and preserve the beauty of the palisades.

The inherent power theory has never been treated of by this Court.

Lack of Trust Directives

The absence of specific direction to the Congress concerning this trust, it is respectfully argued, must mean that the Court must supervise all dispositions of property when requested by the *cestui* raising substantial objection or question.

See *Morgan County National Bank v. Nelson*, 1943, 13 So.2d 765 (Ala.).

This question has never been treated of by this Court.

All the Peach Trees and Potatoes Have Been Planted

The interests which "all the people" (see *United States v. California, supra*) had in the passage of the original legislation in question here, namely, the 1872 Mining Act, have run their course, and have ended. It now is incumbent upon this Court, as implied in *U.S. v. California,* to so indicate.

Article IV, Cl. 2. May Be Simply a Conveyancer's Device

The "difficulty" of Art. IV, Sec. 3, Cl. 2 (Congress' power to "dispose") is readily resolved, too, moreover, when it is remembered that the Farmers could readily see that it was necessary to lodge the power of disposal of property, and of executing valid conveyances, *with some branch of government.* Otherwise, property, real and personal, once lodged in the United States, could never have been divested. Thus, Clause 2 simply expresses the rational and practical solution to the problem of *which branch of government would perform conveyancing,* and does not, it is respectfully suggested, indicate, by any means, particularly when one considers the state of mind of the Farmers, an intention to give unfettered power to Congress to dispose of properties. Certainly, that issue is resolved once and for all by the adoption of the Fifth Amendment prohibiting Government from depriving any person of property without Due Process of Law.

This question has never been treated of by this Court.

Due Process; Absence of Standards;
Absence of Regulations

To meet Due Process requirements, the Secretary of Agriculture, who is charged with the disposal of property in this instance, must set some standards (which he has not done,) or must make some requirements (which he has not done), or conduct some hearings on public benefit (which he has not done), to satisfy the *trust* under which title to the land is undoubtedly held, as expressed in *U.S. v. California, supra.*

This question, as to the Mining Act of 1872, has never been treated of by this Court.

What Are "Valuable Mineral Deposits"?

"All mining claims, to be valid, must meet the test, with respect to the determination of whether there has been discovery of *a valuable mineral deposit*". See *Coleman v. United States,* C.A. Calif. 1966, 363 F.2d 100; *Adams v. United States,* C.A. Calif. 1963, 318 F.2d 861; *Pruess v. Reyes,* D.C. Oreg. 1968, 286 F. Supp. 138, Aff. 410 F.2d 750, Cert. Den., 90 S. Ct. 446, 396 U.S. 967.

Those cases define a valuable mineral deposit as one of such character that "a person of ordinary prudence would be justified in further expenditure of labor and means, with reasonable prospect of success, in developing a valuable mine."

But what person of ordinary prudence?

An ordinarily prudent captain of industry?

An ordinarily prudent stockholder in American Smelting?

An ordinarily prudent Parks and Forest Ranger?

An ordinarily prudent eastern, southern, or northwestern United States citizen who never saw a mine?

Or a judicial officer, who sits to judge controversies among *all* citizens, and is of ordinary prudence, so that he would be inclined to take into account the public benefit to all 203,000,000 Americans, as balanced up against the public detriment to 203,000,000 Americans, including those living in a country over-expanded in population, suddenly under-supplied with wild and natural areas, and areas of aesthetic beauty, recreation and repose?

Certainly, it is time to reconsider the question of what is a "valuable deposit" in terms of meaningfulness to *all*.

This Court has never treated of this question.

Public Opinion Has Changed

It is significant that these lands lie in Idaho, and that in Idaho in the last election for Governor, in 1970, Governor Samuelson, who favored the exploitation—for whatever reason he may have had—of *these* lands, was ousted from public office by an angry populace who elected the present

Governor, Hon. Cecil D. Andrus, on an *environmentalist* platform, which zeroed in on *one* issue: The rape of the White Clouds. *This* rape.

Surely the citizens of Idaho are reasonably prudent. Surely *they* know a valuable mineral deposit when they see one—their economy *depends* on mining! Surely *they* know a *more* valuable national forest when they see one. They *discharged* a non-environmental Governor.

Ninth Amendment Argument

Some of the aforegoing is surely a Ninth Amendment argument. It is that the conveyance of lands which are more valuable as a national park than as an open pit mine has been reserved out of the hands of Congress, and is not included within the terms of the trust.

CONCLUSION

Thus, it is respectfully urged, in keeping with this Honorable Court's Rule 19.1.(b), the Fourth Circuit has, in essence, refused to decide, and no other circuit has ever decided, a number of important questions of federal law which have not been, but should be, settled by this Court, relating to trusts and public lands. The Fourth Circuit and the District Court contended that all of these matters *had* been heretofore settled, by cases which had touched upon the question of the dispositive power of Congress.

Actually, it is respectfully urged, these questions if they have been reached at all, have clearly never been reached under *modern fact circumstances*, circumstances related to growing population pressures, disappearing public land resources, and, particularly, have never been decided in the light the demands of modern biological understanding.

It is respectfully urged that these questions have come to be ripe for determination, and, in fact, that there is a *desperate* need to re-examine them; and that the Courts below erred in automatically following old cases (circa 1940 and before) which did not, in fact, treat of the troublesome problems presented herein in terms of present conditions.

WHEREFORE, the Petitioners pray a Writ of Certiorari be issued to the United States Court of Appeals for the Fourth Circuit, that these questions may be gone into.

Respectfully submitted,

LEONARD J. KERPELMAN,
2403 Rogers Building
Baltimore, Maryland 21209
(301) SA 7-8700

Attorney for Petitioners.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. 70-942T

G. PETER HONCHOK, et al
Plaintiffs,
v.
CLIFFORD M. HARDIN, Secretary, et al
Defendants

OPINION OF COURT (THOMSEN, J. (RET.))

Leonard J. Kerpelman, Baltimore, Md., for plaintiffs.

George Beall, U.S. Atty., and J. Frederick Motz, Asst. U.S. Atty., Baltimore, Md., and Frederick L. Miller, Jr., Atty., Dept. of Justice, for Secretary of Agriculture.

Lewis A. Noonberg and Piper & Marbury, Baltimore, Md., and Daniel M. Gribbon, Richard B. Herzog and Covington & Burling, Washington, D.C., for American Smelting & Refining Co.

THOMSEN, District Judge.

This is an action brought against the Secretary of Agriculture and American Smelting and Refining Company seeking to protect the Challis National Forest in the State of Idaho.

Plaintiffs are a citizen of West Virginia and a citizen of Maryland; the latter sues individually and as President of the North American Habitat Preservation Society, a Pennsylvania corporation.[1] They sue on their own behalf and on behalf of others similarly situated.

Plaintiffs seek (1) a delaratory judgment that the General Mining Law of 1872 (Act of May 10, 1872, c. 152, 17 Stat. 91, 30 U.S.C.A. § 21 et seq.) is unconstitutional; (2) an injunction restraining the Secretary of Agriculture, one of the defendants, from implementing any mining or other claim validation provisions of said law and, particularly, from permitting the other defendant, American Smelting and Refining Company, or anyone else, from "trespassing" upon the Challis National Forest, in the State of Idaho, for the purpose of conducting mining operations or explorations; and (3) a mandatory injunction directing the Secretary "to exercise his ministerial duty which exists, of preventing destructive trespasses upon any national forest, and, more particularly, upon the Challis National Forest, and to prevent the entry of persons whose intention is to mine or prospect thereon." Plaintiffs allege that the corporate defendant is preparing to mine molybdenum in the Challis National Forst,[2] and has applied to the Secretary for a "road permit" which he intends to grant.

Jurisdiction is claimed under 28 U.S.C. §§ 1331 (a), 1332(a) and 1361, venue under 28 U.S.C. § 1391(a), (b), (c) and (e). A three-judge court is requested. 28 U.S.C. §2282.

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[1] The corporation is alleged to be a conservation organization with over 4,000 members, mostly young, who are interested in the preservation of a "viable habitat and environment" and have and will participate in "all the valid uses of the National Forest, including recreational, environment-preservation uses, and just looking and having."

[2]Molybdenum deposits in the Challis National Forest are discussed in the United States Geological Survey Bulletin No. 11-82-E, "Investigations of Molybdenum Deposits in Conterminous United States, 1942-60", 52 (U.S. Government Printing Office, 1965).

The Secretary of Agriculture is said to reside in Maryland. The corporate defendant, a Delaware corporation with its principal office in New York, regularly carries on business in Maryland.

The Secretary has moved to dismiss the complaint for lack of jurisdiction and venue, for lack of standing, and on the merits. The corporate defendant does not question jurisdiction or venue, but has moved to dismiss for lack of standing and lack of a substantial constitutional question.

I.

[1] A single judge to whom an application for an injunction is presented must determine whether a substantial constitutional question is raised before notifying the Chief Judge of the Circuit that a statutory three-judge court should be constituted. Jacobs v. Tawes, 250 F. 2d 611, 614-615 (4 Cir. 1957); Maryland Citizens for a Representative General Assembly v. Governor of Maryland, 429 F. 2d 606, 611 (4 Cir. 1970); Ex parte Poresky, 290 U.S. 30, 54 S. Ct. 3, 78 L. Ed. 152 (1933); Goldstein v. Cox, 396 U.S. 471, 478, 90 S. Ct. 671, 24 L. Ed.2d 663 (1970); Britton v. Bullen, 275 F. Supp. 756, 760-761 (D. Md. 1967), mandamus denied, sub. nom. Britton v. Thomsen, 390 U.S. 979, 88 S. Ct. 1110, 19 L. Ed.2d 1287 (1968). In the *Maryland Citizens* case, the Fourth Circuit said:

> " * * * Insubstantiality in the claim may appear because of absence of federal jurisdiction, lack of substantive merit in the constitutional claim, or because injunctive relief is otherwise unavailable. Such insubstantiality may be evident from the frivolous nature of the claim or from previous decisions of the Supreme Court which require an adverse answer. When it thus appears that there is no substantial question for a three-judge court to answer, dismissal of the claim for injunctive relief by the single district

judge is consistent with the purpose of the three-judge statutes, and it avoids the waste and delay inherent in a cumbersome procedure." 429 F.2d at 611.

II.

[2] Although the Secretary of Agriculture may have a residence in Maryland, he is not being sued individually, but in his official capacity as a federal official. His official residence is in the District of Columbia; he is not a citizens of Maryland within the meaning of 28 U.S.C. §§ 1332(a) or 1391(a) and (b). Butterworth v. Hill, 114 U.S. 128, 132, 5 S. Ct. 796, 29 L. Ed. 119 91885); Stroud v. Benson, 254 F.2d 448, 451-452 (4 Cir. 1958); Berlinsky v. Woods, 178 F.2d 265 (4 Cir. 1949), cert. den., 339 U.S. 949, 70 S. Ct. 805, 94 L. Ed. 1363 (1950); Walters v. Payne, 292 F. 124, 126 (3 Cir.1923). Section 1391(c) does not apply because "each defendant" is not an officer or employee of the United States.

The motion to dismiss filed on behalf of the Secretary must, therefore, be granted and the case dismissed as to him.[3]

III.

[3;4] With the Secretary out of the case, we have as plaintiffs a West Virginia citizens, a Maryland citizen, and a Pennsylvania corporation with its principal office in

[3]Since the Secretary must be dismissed, the Court need not decide whether jurisdiction would lie under 28 U.S.C. §1361. A mandamus will ordinarily be issued against an officer of the United States only to perform a ministerial duty and not ot exercise his discretion in a particular way. Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 50 S. Ct. 320, 74 L. Ed. 809 (1930); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F. 2d 364 (10 Cir.) cert., den., 385 U.S. 831, 87 S. Ct. 70, 17 L. Ed.2d 67 (1966).

Maryland,and as the sole remaining defendant a Delaware corporation with its principal office in New York. Diversity jurisdiction, therefore, exists. The complaint also raises a federal question. There is now no problem as to venue, because the corporate defendant carries on business in Maryland, and has not challenged venue. 28 U.S.C. § 1391(c).

The United States, through the United States Attorney, has agreed that it received adequate notice of the hearing held on April 22, 1971.

IV.

[5] The issue of standing leads into a rapidly developing field. See Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L.Ed.2d 947 (1968); Ass'n of Data Processing Services v. Camp, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed.2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 90 S. Ct. 832, 25 L.Ed.2d 192 (1970); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed.2d 136 (1971); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4 Cir. 1971), and cases and law review articles cited therein, particularly Sierra Club v. Hickel, 433 F.2d 24 (9 Cir. 1970), cert. granted, 401 U.S. 907, 91 S. Ct. 870, 28 L. Ed.2d 805 (1971). The Federal Government has been encouraging the citizens of all the States to use and enjoy the National Parks, National Forests and National Seashores. This Court is loath to dismiss such a case as this for lack of standing until the Supreme Court decides Sierra Club v. Hickle or the Fourth Circuit issues a controlling decision.

V.

[6] The complaint must, however, be dismissed on the merits because the constitutional claim is insubstantial. Plaintiffs do not specify what provision of the Constitution is being violated. Their complaint alleges merely that: "Challis National Forest is public land owned by all the people of the

United States, in common, and it is held in trust for them, along with other public lands, by the United States for public beneficial uses only, and for no uses which would not have been allowed to the sovereign of lands which he held *jus publicum* according to the common law of England, as that law was understood in 1781; by virtue of which fact it is unconstitutional today for the Defendant Hardin to permit the acts complained of ***"; and that: "It is unconstitutional for the Defendant Hardin to dispose of said lands, generally, or to permit the uses complained of, as the lands are owned by the Plaintiffs, or by the people, or by the United States, and the lands are not owned by any of the Defendants."

Plaintiffs' briefs are no more enlightening. Indeed, in the first case they cite, United States v. San Francisco, 310 U.S. 16, 60 S. Ct. 749, 84 L. Ed. 1050 (1940), the controlling principle is stated flatly: "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine". 310 U.S. at 29-30, 60 S. Ct. at 756. This ruling, reiterated in later cases, also answers plaintiffs' concluding point, which reads in its entirety: "And what about the Ninth Amendment? Has not the power to give away, or dispose of, lands of this nature been reserved in the people, as that Congress does not have it?"

[7] The disposition of minerals in lands owned by the United States is by express constitutional grant the responsibility of Congress. Art. 4, § 3, cl. 2 of the Constitution. In Alabama v. Texas, 347 U.S. 272, 74 S. Ct. 481, 98 L. Ed. 689 (1954), the Court said:

> "*** The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.' United States v. Midwest Oil Company, 236 U.S. 459, 474 [35 S. Ct. 309, 59 L. Ed. 673]: 'For it must be borne in mind that Congress not only has a legislative power over the public domain, but it also exercises the

powers of the proprietor therein. Congress "may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale." Camfield v. United States, 167 U.S. [518] 524 [17 S. Ct. 864, 42 L.Ed. 260]; Light v. United States,220 U.S. [523] 536 [31 S. Ct. 485, 55 L. Ed. 570]'; United States v. San Franciso, 310 U.S. 16, 29-30 [60 S. Ct. 749, 84 L. Ed. 1050]; 'Article 4, §3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."' United States v. California, 332 U.S. 19, 27 [67 S. Ct. 1658, 91 L. Ed. 1889] **." 347 U.S. at 273, 74 S. Ct. at 481.[4]

In United States v. Coleman, 390 U.S. 599, 88 S. Ct. 1327, 20 L. Ed.2d 170 (1968), rehearing denied, 391 U.S. 961, 88 S. Ct. 1834, 20 L. Ed.2d 875 (1968), the Court stated, in footnote 1: "the cornerstone of federal legislation dealing with mineral land is the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. §22, which provides in § 1 that citizens may enter and explore the public domain and, if they find 'valuable mineral deposits,' may obtain title to the land on which such deposits are located by application to the

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[4] Mr. Justice Reed concurring, added: "The United States holds resources and territory in trust for its citizens in one sense, but not in the sense that a private trustee holds for a *cestui que trust*. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation ***" 347 U.S. at 277, 74 S. Ct. at 483.

Department of the Interior. The Secretary of the Interior is 'charged with seeing *** that valid claims *** [are] recognized invalid ones eliminated, and the rights of the public preserved.' Cameron v. United States, 252 U.S. 450, 460 [40 S. Ct. 410, 412, 64 L. Ed. 659]." 390 U.S. at 600, 88 S. Ct. at 1329.

Under the Mining Act of 1872, as amended from time to time, the locator of a "valuable mineral deposit" obtains a possessory interest which includes (1) certain rights in a surface area around the deposit, within statutorily described dimensions,[5] and (2) most, but not all, minerals lying within the surface boundary lines extended vertically downward into the earth, and certain veins which extend beyond those lines.[6] Unless the locator performs a certain dollar amount of labor or improvements each year, the claim becomes subject to relocation by others.[7] When the investment in a claim has reached a specified aggregate amount, the locator may apply for a patent to the land, which ordinarily is a fee simple title.[8] Surface rights on certain claims are, however, still limited after patent to mining activities. See for example, the provisions with respect to patents issued under the mining laws affecting lands within certain national forests, 16 U.S.C. §§ 482, 482a-p. Challis National Forest is not one of those so protected. And see the Wilderness Act of 1964, 78 Stat. 890, 893, 16 U.S.C. §§ 1131, 1133 (d) (3).

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[5] 30 U.S.C. §§ 23, 28, 35, 36. For limitations on use of the surface to mining-related activities, see United States v. Coleman, supra, 390 U.S. at 602, 88 S. Ct. 1327, 20 L. Ed.2d 170; Multiple Surface Use Act of 1955, 69 Stat. 368, 30 U.S.C. § 612(a); United States v. Rizzinelli, 182 F. 675, 680-682 (N.D. Idaho 1910).

[6] 30 U.S.C. §§ 35-36. See also 30 U.S.C. § 181 et seq.

[7] 30 U.S.C. §§ 28, 28-1.

[8] 30 U.S.C. § 29.

The President is authorized by statute to declare forest-bearing lands owned by the United States to be national forests, for the purposes of improving and protecting the forests, securing favorable conditions for water flows, and furnishing a continuous supply of timber for the use and necessities of citizens. 16 U.S.C. §§ 471, 475. It is "not the purpose of intent of these provisions *** to authorize the inclusion [in national forests] of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes." 16 U.S.C. §475. Accordingly, mineral lands, "subject to entry under the existing mining laws ***shall continue to be subject to such location and entry ***,"16 U.S.C. §482, and persons may not be prohibited from entering forests for all "lawful purposes" including specifically "prospecting, locating and developing the mineral resources thereof".[9] Activities carried out by such persons on lands which have the status of national forest and which are outside the surface boundaries of a claim must be in accordance with the rules and regulations covering the national forest.[10] Thus, if a mineral locator wishes to gain access to his claim by means of a road across national forest lands not within the boundaries of his claim, he must first obtain a permit for such activity from the Forest Service in the Department of Agriculture.[11]

While wilderness and recreational values may result from the creation of national forests, and Congress has recognized this fact, see 16 U.S.C. § 497, the purposes for which national forests may be created, and in accordance with which they are to be "as far as practicable controlled and administered", 16 U.S.C. §475, contrast with the express references to recreational and wilderness values found in the statues creating the National Park Service to administer national parks, 39 Stat. 535 (1916), 16 U.S.C. §1, and the

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[9] 16 U.S.C. §478.

[10] 16 U.S.C. §§ 472,478, 551.

[11] See 16 U.S.C. § 551; 36 C.F.R. §251.1.

Wilderness Preservation System, 78 Stat. 890 (1964), 16 U.S.C. §1131. The methods chosen by Congress to achieve the objective of the development of the mineral resources of the nation have varied from time to time. Although particular aspects of the 1872 Act have been modified, Congress has repeatedly affirmed the desirability of its basic concepts and principles.[12]

[8] The exercise of the power of Congress under Art. 4, §3, cl. 2 of the Constitution involves economic, technological and philosophic considerations, often requiring choice (1) among various surface uses, such as grazing, irrigation, hydroelectric power, forest management, wildlife refuge, watershed management, and various recretational facilities to serve a wide range of abilities and tastes; and (2) between surface and subsurface uses (mineral developments) where such uses are mutually exclusive.[13]

Choices involving these issues are reflected not only in the General Mining Law of 1872, but in subsequent enactments by Congress, some of which are quite recent, which have affected the development of mineral resources by limiting the right of private persons to develop such resources in certain geographic areas (see 16 U.S.C. §§ 482, 482a-p, discussed

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12. See, e.g., 48 Stat. 1269, 1272 (1934), 43 U.S.C. § 315, 315e (lands established as grazing districts remain open to mineral discovery); 30 Stat. 34, 36 (1897), 16 U.S.C. §§475, 478 (lands declared to be national forests remain open to mineral discovery); 69 Stat. 368, (1955), 30 U.S.C. §612(b) (giving United States the right to manage surface vegetative resources on certain mining claims prior to patent so long as there is no material interference with mining).

13 A choice among various subsurface uses may also be involved. See Multiple Mineral Development Act, 68 Stat. 708 (1954), 30 U.S.C. §531 et seq.

above),[14] or with respect to certain minerals, or time periods. See e.g., 62 Stat. 580 (1948), 16 U.S.C. §678a (congressional grant of authority to prohibit mining in specified areas within Harney National Forest); Mineral Lands Leasing Act of 1920, 41 Stat. 437, 451 (1920), 30 U.S.C. §§181, 193 (removing oil, and certain names hard minerals, from coverage of 1872 Act); Common Varieties Act, 69 Stat. 368 (1955), 30 U.S.C. §611 (removing common varieties of certain substances from coverage of 1872 Act); Wilderness Act of 1964, 78 Stat. 893, 895, 16 U.S.C.§ 1133 (d) (3) (1872 Act not to apply after midnight, December 31, 1983, in areas designated as "wilderness").[15]

[9] Plaintiffs note that the legislative history of the 1872 Act indicates that it was intended for a simpler time than the

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14. This pattern is as old as the General Mining Law itself, for two months before it was passed (17 Stat. 91) the same Congress created by statute Yellowstone National Park, in which mining was not allowed. 17 Stat. 32 (1872).

15. This Act was passed "to assure that an increasing population *** [and] expanding settlement *** does not *** modify all areas within the United States *** leaving no lands *** in their natural condition ***." 78 Stat. 890, 16 U.S.C.§1131(a). At passange, approximately nine million acres were set aside as "wilderness areas" to be maintained so that "the imprint of man's work [is] substantially unnoticeable", for example, without roads. 78 Stat. 891, 894, 16 U.S.C. §§1131(c), 1133(c); H.R.Rep. No. 1538, 88th Cong.2d Sess.1964, in 2 1964 U.S. Code Cong. and Admin. News pp. 3615-17. At least another five million acres are, by express congressional directive, under review by the Secretaries of Interior and Agriculture to determine suitability for "wilderness" status under the Act. 78 Stat. 891-892, 16 U.S.C. § 1132(b), (c), 1964 U.S.Code Cong. and Admin. News, at pp. 3616-18.

present.[16] It is true that certain problems with respect to conservation and environment have arisen in recent years which were not foreseen a century ago. Congress may well wish to reevaluate the priorities between the conflicing interests exemplified by the present case, but under the Constitution that review is for Congress and not the courts. The statutes discussed above and the other statutes passed by Congress with respect to Mineral Rights and Mining, 30 U.S.C., and Conservation, 16 U.S.C., and Conservation, 16 U.S.C., are not unreasonable means of dealing with the responsibilities of Congress in these areas.

A judgment dismissing the complaint will be entered.

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16. See Congressional Globe for January 23, 1872, Volume 45, p. 532.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 71-1726

OPINION OF COURT

PER CURIAM:

Upon examination and consideration of the record and Briefs, we find no error. Accordingly, we dispense with all argument and affirm the judgment below.

AFFIRMED.